(1)

Supreme Court, U.S.
FILED

No. _____ 051495 MAY 22 2006

OFFICE OF THE CLERK

In The

Supreme Court of the United States

SAMUEL E. JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARCIA J. SILVERS
Counsel of Record for Petitioner
DUNLAP & SILVERS, P.A.
Suite 601
2601 South Bayshore Drive
Miami, Florida 33133
305/854-9666

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Sixth Circuit's decision that the prosecutor's pronounced and persistent improper remarks during closing argument did not deprive Petitioner of a fair trial conflict with the principles enunciated in this Court's decision in *Berger v. United States*, 295 U.S. 78 (1935) and with the requirement of the Due Process Clause of the Fifth Amendment to the United States Constitution that all criminal trials must be fair?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were as in the caption.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding Below	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional Provision Involved	1
Statement of the Case	2
Reasons for Granting the Petition	7
Conclusion	15

APPENDIX

Order of the United States Court of Appeals for the Sixth Circuit affirming Petitioner's convictions .....App. 1

Judgment of Conviction and Sentence of the Circuit Court of the United States District Court for the Northern District of Ohio, Eastern Division.....App. 11

TABLE OF AUTHORITIES

Page

CASES

Berger v. United States, 295 U.S. 78 (1935) 7, 13, 15

Macias v. Makowski, 291 F.3d 447 (6th Cir. 2002) 11

United States v. Bess, 593 F.2d 749 (6th Cir. 1979) 8, 9

United States v. Blakey, 14 F.3d 1557 (11th Cir. 1994) 15

United States v. Carter, 236 F.3d 777 (6th Cir. 2001) 9

United States v. Francis, 170 F.3d 546 (6th Cir. 1999) 12

United States v. Hands, 184 F.3d 1322 (11th Cir. 1999) 15

United States v. Young, 470 U.S. 1 (1985) 9, 11

CONSTITUTIONAL PROVISION

U.S. Const. Amend. V 1

OTHER AUTHORITIES

The. Hon. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals As Witnesses*, 47 Hastings L.J. 1381, 1382, 1385 (1996) 14

PETITION FOR WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The unpublished Opinion of the United States Court of Appeals for the Sixth Circuit affirming Petitioner's convictions is reprinted in the Appendix at App. 1-10. The unpublished "Judgment in a Criminal Case" of the United States District Court for the Northern District of Ohio, Eastern Division, is reprinted in the Appendix at App. 11-20.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 21, 2006. This petition for a writ of certiorari is filed within 90 days of that date, in compliance with Rule 13 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person . . . shall . . . be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition Below

The Petitioner, Samuel E. Johnson, was charged in Counts One and Two of an Indictment with aiding and assisting in the preparation of false tax returns in violation of 26 U.S.C. § 7206(2). Petitioner Johnson pled not guilty and proceeded to trial before a jury. He was convicted on both counts.

On February 14, 2005, the district court sentenced Petitioner to a term of imprisonment of 30 months as to Counts One and Two to run concurrently, to be followed by a term of supervised release of one year. Petitioner timely filed a notice of appeal. The Court of Appeals affirmed the convictions on February 21, 2006.

II. Statement of Facts

The Government's Case

Federal and State Corporate Advisors, Inc. (hereinafter "F&S") located in Hialeah, Florida, was a business that administered job tax credit programs for large corporations. The Work Opportunity Tax Credit program (hereinafter "WOTC") was one such program. It enabled large corporations to receive a tax credit for each of its employees who had a disadvantaged employment history prior to being hired by the corporation. F&S had 15 to 20 employees.

On April 25, 1996, Jo-Ann Stores, Inc., (hereinafter "Jo-Ann Fabrics") headquartered in Hudson, Ohio, contracted with F&S to have F&S administer the WOTC program on its behalf. F&S' responsibilities included identifying potential employee candidates for the WOTC

program by conducting telephone interviews with them, obtaining written State certifications verifying employees' eligibility for the WOTC program and tabulating monthly WOTC figures. In return for those services, Jo-Ann Fabrics agreed to pay F&S a fee of 15 percent of the WOTC tax credits Jo-Ann Fabrics earned. These commissions were paid directly to F&S by Jo-Ann Fabrics on a monthly basis.

F&S was owned by Brian Eden who was its president. Paul Friedlander was F&S' vice president. Both Eden and Friedlander testified for the government at Petitioner's trial pursuant to plea agreements enabling them to obtain sentence reductions.

At the time that Eden testified at Johnson's trial, Eden was serving a sentence of 37-months imprisonment with the possibility of having his sentence reduced pursuant to a governmental motion under Federal Rule of Criminal Procedure 35. Eden's 37-month sentence was the result of Eden being indicted in three separate federal criminal cases, including this case. In return for pleading guilty and agreeing to testify for the government in this case, Friedlander received a reduced sentence of three years probation and six months house arrest.

As the owner of F&S, Eden's personal monetary benefits increased whenever Jo-Ann Fabrics' WOTC tax credits increased. Friedlander's monetary benefits were also directly linked to the number of WOTC tax credits F&S told Jo-Ann Fabrics to claim. He received a salary of $1,000 per week plus 20 percent of the 15 percent commission earned by F&S on Jo-Ann Fabrics' WOTC tax credits. In contrast, the trial judge made an express finding at Petitioner's sentencing that Petitioner "did not profit"

from the commissions earned by F&S on Jo-Ann Fabrics' WOTC tax credits. Petitioner was merely a salaried employee who received a small Christmas bonus.

Friedlander testified that Eden directly supervised all of the employees at F&S, including Petitioner, and Eden ran the day-to-day operations there. However, Eden directly contradicted Friedlander by testifying that Friedlander was the "de facto president" of F&S who was in charge of overseeing everything at F&S on a day-to-day basis, because Eden only rarely came to the office. Eden and Friedlander also directly contradicted each other at trial when they accused each other of initiating the charged fraud involving Jo-Ann Fabrics. Eden also lied in pre-trial interviews with FBI agents about this case.

At the trial, it was undisputed that Friedlander was the person at F&S who negotiated and signed the contracts between Jo-Ann Fabrics and F&S and who met with representatives of Jo-Ann Fabrics in Hudson, Ohio.

Four other employees of F&S testified for the government at Petitioner's trial. These four employees confirmed that Eden and Friedlander were the two top people at F&S and that Petitioner merely managed the telephone operators whose job it was to interview the new employees of its clients for the WOTC program.

Eden and Friedlander testified that, beginning in 1997 and continuing through 1999, they and other F&S employees created false reports which inflated the number of employees who were eligible for WOTC tax credits and mailed those reports to Jo-Ann Fabrics. Eden testified that it was Friedlander's idea to create false certificates of WOTC eligibility. John Martin, a computer operator at F&S who testified for the government in return for a

promise from the government for complete immunity, testified that he created templates used to make false certificates of WOTC eligibility that were provided to Jo-Ann Fabrics.

Friedlander, Eden and Martin testified that Petitioner was aware that false certificates of WOTC eligibility were mailed to Jo-Ann Fabrics. According to these three witnesses who all had motives to lie, Petitioner provided information to Friedlander and the computer programmers to help them in creating false certifications.

Two of the telephone operators at F&S and a computer programmer there testified that they forged signatures on documents at Petitioner's request but were unable to identify those documents or describe them. They were never told why they were asked to do so. One of these telephone operators testified that it may have been legal and permissible for her to sign documents in this manner. None of these three F&S employees ever reported their alleged forgeries to law enforcement officers until 2004 when they were contacted by law enforcement officers.

Martin who, as previously discussed, received total immunity from prosecution in return for testifying, and Eden, who negotiated a 37-month sentence and a possible further sentence reduction for testifying, claimed that Petitioner asked telephone operators at F&S to forge signatures on certification forms pertaining to WOTC eligibility.

Ann Welki, the corporate director of taxes for Jo-Ann Fabrics, testified that, when the Internal Revenue Service began examining Jo-Ann Fabrics' WOTC tax credits, she started investigating the accuracy of those credits claimed on Jo-Ann Fabrics' tax returns for the periods ending with

the fiscal years of January 30, 1998 and January 30, 1999. Welki compared documents showing the number of employees of Jo-Ann Fabrics who had actually received certifications of WOTC eligibility to the number of employees who F&S had claimed were eligible for those credits and there was a serious discrepancy between those two numbers. According to Welki, for the tax return on the fiscal year ending January 30, 1998, Jo-Ann Fabrics claimed WOTC tax credit was $858,623 when, in fact, the actual WOTC tax credit should have been $100,858. As a result, Jo-Ann Fabrics' tax liability on that return was $492,528.

In addition, according to Welki, for the fiscal year ending January 30, 1999, Jo-Ann Fabrics claimed WOTC tax credit was $1,581,545. However, the actual credit was $175,000. As a result, according to Welki, Jo-Ann Fabrics' tax liability on that return was $914,010. The government never introduced the underlying documents upon which Welki's claim of a discrepancy was based.

On August 18, 1999, Jo-Ann Fabrics terminated its relationship with F&S.

The Defense Case

Petitioner testified on his own behalf and denied any involvement in the false certification process. He explained that, in about early 1998, he became the supervisor of the telephone operators. In 1998, he also received the certifications for WOTC eligibility that came from the States and indicated on the computer that these certifications had been received.

Petitioner testified that Friedlander was solely responsible for client contact, including assembling the documentation pertaining to clients' WOTC eligibility and mailing those documents to the clients.

Petitioner further testified that, on two occasions in 2002, he voluntarily met with law enforcement investigators about this case without an attorney because he had nothing to hide. On both occasions, he stated that he had nothing to do with any falsification of documents at F&S.

REASONS FOR GRANTING THE PETITION

I. Certiorari should be granted because the Sixth Circuit's decision that the prosecutor's pronounced and persistent improper remarks during closing argument did not deprive Petitioner of a fair trial conflicts with the principles enunciated in this Court's decision in *Berger v. United States*, 295 U.S. 78 (1935) and with the requirement of the Due Process Clause of the Fifth Amendment to the United States Constitution that all criminal trials must be fundamentally fair.

The Prosecutor's Repeated Improper Remarks

In his closing argument, the prosecutor made many references to facts not in evidence. *First*, after the prosecutor told the jury in his opening statement that "the top three management people at F&S have been prosecuted for this crime" and that Petitioner was "the third manager or supervisor" at F&S, he reminded them of that alleged fact during closing argument and then told the jurors that, prior to charging anyone in this case, his office made a